

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building  
100 Maryland Avenue  
Rockville, Maryland 20850  
240-777-1162

**Case No. S-1162**

**PETITION OF JACQUELINE ROGERS**

**RESOLUTION TO TRANSFER SPECIAL EXCEPTION**

(Resolution adopted October 10, 2001)  
(Effective date of Resolution, January 23, 2002)

The Board received a letter dated August 29, 2000, from Douglas M. Cobb. Mr. Cobb's letter states in part:

"I am writing to request a transfer of the special exception and licenses to my name for my accessory apartment at 5716 Massachusetts Avenue, Bethesda, Maryland 20818-1929. I would like to retain this accessory apartment as a rental unit. I have enclosed a copy of the Board of Appeals Opinion granting the special exception to the previous owner. . . . Thank you for your consideration."

The subject property is Lot 3, Block 22, Glen Mar Park, located at 5716 Massachusetts Avenue, Bethesda, Maryland, in the R-60 Zone.

The Board considered the transfer request at its worksession held September 19, 2000 and approved the transfer. By resolution dated, March 14, 2001, the Board, by administrative action granted the transfer from Jacqueline H. Rogers to Douglas M. Cobb.

On March 19, 2001, the Board received a letter from Mr. Thomas Kyhos, an immediate adjacent neighbor residing at 5714 Massachusetts Avenue, requesting a public hearing be held on the transfer request. On June 13, 2001, the Board granted Mr. Kyhos' public hearing request.

On October 10, 2001 the Board held a hearing pursuant Section 59-G-1.3 of the Montgomery County Zoning Ordinance. At the October 10, 2001 hearing, Petitioner Douglas M. Cobb testified . Housing Inspector Kevin Martell of the Department of Housing and Community Development testified. Mr. and Mrs. Thomas F. Kyhos, immediate adjacent neighbors testified. Mrs. Regina Northup, an immediate adjacent neighbor also testified. At the October 10, 2001 hearing Martin J. Hutt, Esq. appeared on behalf of the Petitioner. He called Mr. Cobb as a witness.

**Decision of the Board:**

Special Exception **Granted**, subject to conditions enumerated below.

**EVIDENCE PRESENTED TO THE BOARD**

1. Petitioner seeks permission under Section 59-G-1.3 to transfer the special exception and license from Jacqueline H. Rogers for an accessory apartment located at 5716 Massachusetts Avenue, Bethesda, Maryland to the Petitioner.
2. The lot contains 7,850 square feet.
3. The Cobbs have owned the subject property since June 28, 1999.
4. The accessory apartment is located in a one-story addition on the left side of the house and contains a living/dining room combination, kitchen, bedroom and bathroom.
5. The Cobbs proposed no exterior modifications.
6. The accessory apartment has the same address as the house, and has a separate entrance.
7. On street parking is available.
8. Mr. and Mrs. Kyhos testified about their concerns as to the effect of the accessory apartment on the use and enjoyment of their property since the entrance to the accessory apartment is by means of a porch facing the side of their home.
10. Subsequent to the public hearing, by letter dated December 3, 2001, the Petitioner has agreed with Mr. and Mrs. Kyhos to make the following modifications to address Mr. & Mrs. Kyhos' concerns.
  - a. The motion sensors will be completely removed.
  - b. The side stairs and porch will be completely removed.
  - c. The existing two (2) door(s) on the side of the Cobb's home used for entrances into the accessory apartment will be completely removed and resided and a new window will be provided to the bedroom of the accessory apartment to provide the code required second means of emergency egress from the accessory apartment.

- d. Six (6)- 4' tall Leyland Cyprus will be planted to screen the Cobb's home from the Kyhos' home.
- e. Access to the accessory apartment will be limited to the side of the Cobb's home opposite the Kyhos' home.
- f. The Cobbs shall use their best efforts to have all of the above modifications completed on or before March 1, 2002.

## **FINDINGS OF THE BOARD**

### **Sec. 59-G-1.2. Conditions for granting a special exception.**

59-G-1.2.1. Standard for evaluation. A special exception must not be granted absent the findings required by this Article. In making these findings, the Board of Appeals, Hearing Examiner or District Council, as the case may be, must consider the inherent and non-inherent adverse effects of the use on nearby properties and the general neighborhood at the proposed location, irrespective of adverse effects the use might have if established elsewhere in the zone. Inherent adverse effects are the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations. Inherent adverse effects alone are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site. Non-inherent adverse effects, alone or in conjunction with the inherent effects, are a sufficient basis to deny a special exception.

#### **59-G-1.21. General Conditions.**

- (a) A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:
  - (1) Is a permissible special exception in the zone .

*The Board finds that an accessory apartment is a permissible special exception in the R-60 Zone.*

- (2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

*The Board finds, as discussed below, that the proposed use complies with the standards and requirements in Section 59-G-2.00 for an accessory apartment.*

- (3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the commission. Any decision to grant or deny special exception must be consistent with any recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

*The Board finds granting of the special exception for an accessory apartment at the subject property would not be inconsistent with the applicable Master Plan.*

- (4) Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.

*The accessory apartment has a separate entrance on the side of the house opposite the Kyhos' home. The Board takes note of the testimony about the availability of on street parking and finds that there appears to be parking available on street. The proposed exterior modifications will address the concerns of the adjacent property owner. Thus the use will maintain the residential appearance of the dwelling, will have a relatively low impact on neighboring properties, and will be in harmony with the general, residential character of the neighborhood.*

- (5) Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

*Because of the limited impact of the use on neighboring properties as described above, the Board finds that the use will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood.*

- (6) Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

*With the proposed modifications on the side of the Cobbs' home adjacent to the Kyhos' home, the proposed accessory apartment will have none of the above-cited effects.*

- (7) Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendation of a master or sector plan do not alter the nature of an area.

*This use will be the only special exception in the neighborhood.*

- (8) Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

*The proposed accessory apartment will have none of the above-cited effects.*

- (9) Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer public roads, storm drainage and other public facilities.

*The house is served by public utilities.*

- (i) If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception.

N/A

- (ii) With regard to findings relating to public roads, the Board, the Hearing Examiner, or the District Council, as the case may be, must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.

#### **Sec. 59-G-2.00. Accessory apartment.**

A special exception may be granted for an accessory apartment on the same lot as an existing one-family detached dwelling, subject to the following standards and requirements:

**(a) Dwelling unit requirements:**

- (1) Only one accessory apartment may be created on the same lot as an existing one-family detached dwelling.

*Only one accessory apartment is proposed.*

- (2) The accessory apartment must have at least one party wall in common with the main dwelling on a lot of one acre (43,560 square feet) or less. On a lot of more than one acre, an accessory apartment may be added to an existing one-family detached dwelling, or may be created through conversion of a separate accessory structure already existing on the same lot as the main dwelling on December 2, 1983. An accessory apartment may be permitted in a separate accessory structure built after December 2, 1983, provided:

*The accessory apartment has at least one party wall in common with the main dwelling.*

- (3) An addition or extension to a main dwelling may be approved in order to add additional floor space to accommodate an accessory apartment. All development standards of the zone apply. An addition to an accessory structure is not permitted.

*No addition is proposed.*

- (4) The one-family detached dwelling in which the accessory apartment is to be created or to which it is to be added must be at least 5 years old on the date of application for special exception.

*The house was built in 1948.*

- (5) The accessory apartment must not be located on a lot:

- (i) That is occupied by a family of unrelated persons; or
- (ii) Where any of the following otherwise allowed residential uses exist: guest room for rent, boardinghouse or a registered living unit; or
- (iii) That contains any rental residential use other than an accessory dwelling in an agricultural zone.

*None of the above-cited conditions exist on the subject property.*

- (6) Any separate entrance must be located so that the appearance of a single-family dwelling is preserved.

*The entrance for the accessory apartment is located at the side of the house.*

- (7) All external modifications and improvements must be compatible with the existing dwelling and surrounding properties.

*The proposed external modifications will be compatible with the existing dwelling and surrounding properties.*

- (8) The accessory apartment must have the same street address (house number) as the main dwelling.

*The accessory apartment has the same address as the house.*

- (9) The accessory apartment must be subordinate to the main dwelling.

*The accessory apartment is located within the main dwelling and is subordinate to, the main dwelling.*

**(b) Ownership requirements:**

- (1) The owner of the lot on which the accessory apartment is located must occupy one of the dwelling units, except for bona fide temporary absences not exceeding 6 months in any 12-month period. The period of temporary absence may be increased by the Board upon a finding that a hardship would otherwise result.

*The Cobbs live in the house.*

- (2) Except in the case of an accessory apartment that exists at the time of the acquisition of the home by the applicant, one year must have elapsed between the date when the owner purchased the property (settlement date) and the date when the special exception becomes effective. The Board may waive this requirement upon a finding that a hardship would otherwise result.

*The accessory apartment existed at the time the Cobbs purchased the home.*

- (3) Under no circumstances is the owner allowed to receive compensation for the occupancy of more than one dwelling unit.

- (4) For purposes of this section, "owner" means an individual who owns, or whose parent or child owns, a substantial equitable interest in the property as determined by the board.

*The Cobbs live in the house and will receive compensation only for the one(1) accessory apartment.*

- (5) The restrictions under (1) and (3) above do not apply if the accessory apartment is occupied by an elderly person who has been a continuous tenant of the accessory apartment for at least 20 years.

**(c) Land use requirements:**

- (1) *The minimum lot size must be 6,000 square feet, except where the minimum lot size of the zone is larger. A property consisting of more than one record lot, including a fraction of a lot, is to be treated as one lot if it contains a single one-family detached dwelling lawfully constructed prior to October, 1967. All other development standards of the zone must also apply, including setbacks, lot width, lot coverage, building height and the standards for an accessory building in the case of conversion of such a building.*

*The lot size is 7,850 square feet.*

- (2) An accessory apartment must not, when considered in combination with other existing or approved accessory apartments, result in an excessive concentration of similar uses in the general neighborhood of the proposed use (see also Section 59-G-1.21(a)(6) which concerns excessive concentration of special exceptions in general).

*The proposed accessory apartment would be the only special exception in the neighborhood.*

- (3) There shall be adequate water supply and sewage disposal systems to serve the occupants of both the accessory apartment and the main dwelling.

*The house is served by public utilities.*

- (4) Adequate parking shall be provided. There must be a minimum 2 off-street parking spaces, unless the Board makes either of the following findings:

- (i) More spaces are required to supplement on-street parking; or
- (ii) Adequate on-street parking permits fewer off-street spaces.

Off-street parking spaces may be in a driveway but otherwise shall not be located in the yard between the front of the house and the street right-of-way line.

*There are two (2) off-street parking spaces available plus there is adequate on-street parking available.*

- (5) Accessory apartments shall not be detrimental to the use and peaceful enjoyment of surrounding properties or the general neighborhood, and shall cause no objectionable noise, traffic or other adverse impacts.

*The Board finds, as discussed above, that the accessory apartment will maintain the residential appearance of the home, in keeping with the*



*residential character of the neighborhood. In addition because adequate off-street parking and on-street parking is available, it will have minimal impact on surrounding properties.*

Based upon the foregoing, the Board finds that the special exception to permit an existing accessory apartment can be granted, subject to the following conditions:

1. Petitioner shall be bound by all of his testimony and exhibits of record and the testimony of his witnesses, and of his attorney, to the extent that such testimony and representations are identified in the Board's opinion granting the special exception.
2. Petitioner will use their best efforts to construct the modifications to be made on the side of the subject dwelling adjacent to the Kyhos' property on or before March 1, 2002.
3. All terms and conditions of the original Special Exception with any previous modification continue to apply.
4. Park and Planning staff conditions.

On a motion by Donna L. Barron, seconded by Louise L. Mayer, with Allison I. Fultz, Angelo M. Caputo and Donald H. Spence, Jr., Chairman in agreement, the Board adopted the following Resolution.

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland, that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled case.

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Donald H. Spence, Jr.  
Chairman, Montgomery County Board of Appeals

Entered in the Opinion Book  
of the Board of Appeals for  
Montgomery County, Maryland  
this 23<sup>rd</sup> day of January, 2002.

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Katherine Freeman  
Executive Secretary to the Board

**NOTE:**

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure.

See Section 59-A-4.53 of the Zoning Ordinance regarding the twenty-four month period within which the special exception granted by the Board must be exercised.

See Section 59-A-3.2 of the Zoning Ordinance regarding Use and Occupancy Permit for a Special Exception.

